IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 995 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ANILKUMAR MADANLAL SHARMA

Versus

STATE OF GUJARAT

Appearance:

MR GA PATHAN for Petitioner

MR HL JANI, Ld. APP for Respondent

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 13/07/2001

ORAL JUDGEMENT

1. Heard Mr.G.A.Pathan, learned advocate for the petitioner and Mr.H.L.Jani, learned APP for the respondent - State.

2. In the present petition, the show cause notice

has been issued by the Assistant Police Commissioner, "A" Division, Ahmedabad under Section 59 of the Bombay Police Act, 1951 (hereinafter shall be referred as "the Act") on 2/11/1998 and the order of externment dated 30/7/1999 has been passed by the Deputy Commissioner of Police, Ahmedabad under Section 56(c) of the Act and the appeal has been dismissed on 28/10/1999. Against the above orders the present petitioner has preferred the present petition.

3. Mr.G.A.Pathan, learned advocate for the petitioner has challenged the order of externment on various grounds. But according to his submission, the statement of the secret witnesses have been recorded prior to the issuance of the show cause notice to the petitioner, but no details have been given by the concerned authority to the petitioner, at the time of issuing the show cause notice. He has also submitted that the allegations which have been made in the present notice are vague and general in nature. He has also submitted that the concerned authority has decided to remove the present petitioner for a period of two years from adjoining Districts Ahmedabad Rural, Gandhinagar, Kheda and Mehsana. But for that no reasons have been given by the concerned Authority. He has also submitted that looking to the offences, which have been registered against the present petitioner, the same relate to 1998 and the order of externment has been passed on 30/7/1999. There were 8 months delay in passing the externment order by the concerned Authority. He has also submitted that the final order dated 30/7/1999 is not a speaking and reasonable order because on what material and how the authority has come to the conclusion against the present petitioner is not known. There was no discussion in the final order in respect to the material which has been taken into account against the present petitioner by the concerned authority. Therefore, he has further submitted that both the orders are required to be quashed and set aside.

4. Mr.H.L.Jani, learned APP appearing on behalf of the respondent - State has submitted that there was ample material which was disclosed to the petitioner in show cause notice. The petitioner has not remained present before the concerned authority in response to the show cause notice and only submitted the reply and, thereafter, not participated in the inquiry by the petitioner and, therefore, whatever material was placed before the concerned authority, the same has been taken into account by the concerned authority and the order of externment is rightly passed by the concerned authority.

Similarly, the Appellate Authority has also considered the contentions, which have been raised by the petitioner, and has rightly rejected the appeal filed by the petitioner. Therefore, according to him, both the orders are legal and valid and looking to the material placed on record, both the authorities are justified in passing such orders against the present petitioner.

5. I have considered the submissions of both the learned advocates. The fact remained that the statement of the secret witnesses, obtained by the concerned authority, were relied by the appellate authority, but the same was not disclosed by the concerned authority in show cause notice. The provision of Section 59 of the Act provides for giving reasonable effective opportunity to the externee before passing the externment order against the externee. If any material has been taken into account which is adverse to the petitioner, the same has to be given so that he can make an effective defence and can file a reply before the concerned authority. If the concerned authority considered the same material and not disclosed the complete material to the petitioner, it amounts to denying the reasonable opportunity to the petitioner and the same has been violative of the basic principle of natural justice. The concerned authority has not given any reason in the show cause notice why the present petitioner has been removed from adjoining Districts of Ahmedabad Rural, Gandhinagar, Kheda and Mehsana. It is necessary to note that the final order is not a speaking and reasonable order because the concerned authority has not discussed the evidence and material which have been taken into account against the present petitioner. It adversely effects the right of the petitioner to file an appeal before the Appellate Authority. After perusal of the final order of externment passed by the Authority, according to my opinion, the authority has not applied his mind properly and simply said that I have carefully considered the material and after taking into account, the authority is satisfied to pass an order of externment. This is not sufficient. It requires detailed reasons; that on what material and how the authority has come to the conclusion and which material was taken into account against the present petitioner. The petitioner effectively challenged the order of externment before the appellate authority. However, there is another aspects of the matter that the statement of the secret witnesses were recorded and the same has been relied by the appellate authority, while rejecting the appeal, but this material has not been disclosed by the concerned authority, while issuing the show cause notice to the petitioner. It has

also adversely effected the legal right of the petitioner for tendering the reply or put forward his defence in reply to the show cause notice. The purpose of enacting Section 59 is to give effective reasonable opportunity to the externee before passing the externment order and, therefore, it is a duty of such authority to disclose all the materials, which are adverse to the petitioner and which has been taken into account by the concerned Authority against the petitioner. In absence of that, the order of externment is bad and illegal. There is another aspect, that registered offence relate to the Year-1998 and show cause notice is dated 2/11/1998 and the order of externment was passed on 30/7/1999. The view is taken by this Court in the case of BALVANT SINGH @ NANIO v. DEPUTY COMMISSIONER OF POLICE & ANR., reported in 1999 Cr.L.R. (Guj.) 140. The relevant observations are found in paras - (4) and (6), which are quoted as under :-

"4. First contention has been that there was delay in passing the externment order. The externment order was passed on 1.10.1997. The show cause notice was issued to the petitioner on 7.5.1997. One case u/s.323, 325, 114, 506 IPC and Sec.135 of the Bombay Police Act was registered in the Year 1994. It was urged that the cases against the petitioner under the Prohibition Act were not taken into consideration by the Externing Authority. the Externing Authority considered the statement of two witnesses. This contention seems to be incorrect. The order of Externing Authority shows that statement of three witnesses recorded on 9.12.1996, 23.12.1996 & 21.2.1997 were taken into consideration. These witnesses on account of the fear of the petitioner refused to disclose their indentity and requested for keeping their names and addresses secret. Consequently it is to be seen whether the externment order passed on 1.10.1997 suffers from the fatal defect of delay as computed from 21.2.1997 when the third witness was examined. Of course, from registration of first case under the IPC in the year 1994 there is considerable delay in passing the impugned order on 1.10.1997. Computed from 21.2.1997 when the last undisclosed witness was examined there seems to be further delay of about nine months. In support of his contention the counsel for the petitioner has referred to the case of Khemiben w/o Ishwarji Harchandji vs. Deputy Police Commissioner reported in 1997 (2) GLH 473. In

this case the externment order was passed after about more than one year. This unexplained delay was considered in the aforesaid case to be fatal and the externment order was quashed. In the case before me also there is no explanation of this delay of about nine months. No Counter Affidavit has been filed from the side of the respondent explaining the reasons for delay in passing the impugned order of detention. Thus, unexplained delay of nine months is certainly fatal and impugned order is illegal and invalid. Learned A.G.P. on the other hand has relied upon a Division Bench pronouncement of this Court in Babubhai M. Shaikh vs. State of Gujarat reported in 1989 (1) GLR 574. The ratio of this is that the Externing Authority must be subjectively satisfied that there exists grounds for passing externment order and there must also be material to show that witnesses were not prepared to depose against the externee. If these two conditions are satisfied merely because there is some delay or because the externee is in jail could not vitiate the order of externment. The contention raised by the learned Counsel for the respondent in the case before me was directly not under consideration before the Division Bench Babubhai's case (supra). From Para:9 of the said Judgment it is clear that according to Division bench there was delay in passing the exetrnment order, but this delay was considered to be insignificant. The delay was on another ground not on the grounds argued in this writ petition. The grounds of challenge in Babubhai's case were all together different. In that case externment order was passed on 4.8.1988. The externee submitted his written submissions and oral arguments on 6.6.1988. Thereafter, detention order was passed on 4.8.1998. This was considered to be insignificant delay. hence, the detention order was held to be valid. here the delay under consideration was the delay which took place in the conduct of proceedings whereas the point raised before me has been delay in passing the impugned order after disclosure of last unregistered case against the petitioner. Consequently this case does not help the learned A.G.P. The delay has not been satisfactorily explained by the respondent which has rendered the impugned orders invalid.

6. The order is also not a speaking order.

An order can not be said to be speaking order simply because it runs in six pages. The conclusion of the Externing Authority to the following effect.

"Heard the submissions made by you and your Advocate. After carefully examining evidences produced for prosecution and defence at the end of discussion I am satisfied that there are sufficient evidences to believe that if your externment will not be made then you will continue your criminal anti-social activities. Therefore, there are sufficient and reasonable grounds for your externment."

From this it is clear that only subjective satisfaction was arrived at by the Externing Authority and not that there was slight discussion of evidence adduced by the petitioner and no ground for its rejection was given by the Externing Authority. The Appellate Authority simply observed that it seems that due to good relation with appellant they (which means witnesses) came to give evidence and it seems that they are suppressing material facts. This is also nothing but subjective satisfaction of the Appellate Authority. No reason has been given why uncross-examined statements could not be believed by the Appellate Authority and on what material quasi-judicial authority made observation that the witnesses of the petitioner were suppressing material facts. In Jorubhai Aapabhai Kathi Darbar vs. Sub-Divisional Magistrate reported in 1996 (1) GLH 53 this Court found that where the Externing Authority did not set out explanation given by the Externee the order of externment becomes totally non-speaking order as it does not disclose any reason or justification. Thus, for this reason also the impugned orders are rendered illegal."

6. In the light of the above observation and considering the facts of the present case, the present case is squarely covered by this decision in as much as there is a delay in passing the externment order, the order is non-speaking order and all the materials have not been disclosed to the petitioner which were taken into account by the concerned Authority and, therefore, it is also violative of the basic principle of natural

justice.

7. In the result, the present petition is allowed. The order of externment dated 30/7/1999 and the order of Appellate Authority dated 28/10/1999 are hereby quashed and set aside. Rule is made absolute. Direct service is permitted.

(H.K.RATHOD,J.)

(vrpanchal)**